FILE COPY

Supreme Court, U. S.
FILED
APR 5 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-617

ELMER GERTZ,

Petitioner,

vs.

ROBERT WELCH, INC.,

Respondent.

BRIEF OF PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WAYNE B. GIAMPIETRO
120 S. LaSalle Street
Suite 1805
Chicago, Illinois 60603
Attorney for Petitioner

MIDWEST LAW PRINTING CO., CHICAGO 60601, FINANCIAL 6-3900

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	4
SUMMARY OF THE ARGUMENT	13
ARGUMENT:	
I.	
Petitioner's Right Of Privacy Has Been Wrongfully Destroyed By Respondent	16
II.	
Attorneys Are Entitled To Particular Protection When Representing Clients	37
III.	
Respondent Was Guilty Of Actual Malice	39
IV.	
Petitioner Was Denied A Fair Trial And Due Process	48
CONCLUSION	53

Table Of Authorities

Cases

Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S. Ct. 1975 (1967) 21, 24, 33, 50, 52

Garrison v. Louisiana, 379 U.S. 64, 85 S. Ct. 209 (1964) 18

Goldwater v. Ginzburg, 414 F. 2d 324 (2d Cir. 1969), cert. den. 396 U.S. 1049, reh. den. 397 U.S. 978 ..... 46, 47, 48, 51, 52

Griswold v. Connecticut, 381 U.S. 479, 484-85, 85 S. Ct. 1678 (1965) 34

Monitor Patriot Co. v. Roy, 401 U.S. 265, 91 S. Ct. 621 (1971) 19, 20

Monroe v. Pape, 364 U.S. 167, 81 S. Ct. 473 (1961) .. 35

New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710 (1964) 16, 17, 18, 20, 40

Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 91 S. Ct. 628 (1971) 20

Olmstead v. United States, 277 U.S. 438, 478, 48 S. Ct. 564, 572 (1928) 26

Pape v. Time, Inc., 401 U.S. 279, 91 S. Ct. 633 (1971) .. 20

People v. Nuccio, 43 Ill. 2d 374 (1969) 37

People v. Nuccio, ... Ill. 2d ..... (Docket No. 43820, March 27, 1973) 37

Pierson v. Ray, 386 U.S. 547, 87 S. Ct. 1213 (1967) .. 35

Rosenblatt v. Baer, 383 U.S. 75, 86 S. Ct. 669 (1966) .. 18, 21

Rosenbloom v. Metromedia, 403 U.S. 29, 91 S. Ct. 1811 (1971) 23, 28

St. Amant v. Thompson, 390 U.S. 727, 88 S. Ct. 1323 (1968) 19, 35, 40, 44

Time, Inc. v. Hill, 385 U.S. 374, 87 S. Ct. 534 (1967) .. 26

Constitutional Provisions

Fourth Amendment to the United States Constitution 34

Fifth Amendment to the United States Constitution .. 34, 49

Fourteenth Amendment to the United States Constitution 49

Illinois Constitution of 1970, Article I, section 12 30

In The

Supreme Court of the United States

October Term, 1972

No. 72-617

ELMER GERTZ,

Petitioner,

vs.

ROBERT WELCH, INC.,

Respondent.

BRIEF OF PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW.

The opinion of the Court of Appeals is as yet unreported. The opinion of the District Court is reported at 322 F. Supp. 997. The order denying Plaintiff's Petition for Rehearing in the Court of Appeals is unreported. The various opinions and orders are set forth in the appendices to the petition for writ of certiorari.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on August 1, 1972. A petition for rehearing with a suggestion for rehearing en banc was filed on August 15, 1972, and denied on September 7, 1972. The Petition for Certiorari herein was filed and docketed in this Court on October 20, 1972. This Court granted the Petition for Certiorari on February 20, 1973. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED.

First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to the United States Constitution:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTIONS PRESENTED.

1. Whether petitioner, who was referred to and treated in an admittedly defamatory article as a private attorney, was a public figure within the requirements of the First Amendment?

2. Whether an article alleging a Communist conspiracy to harass the police, with no evidentiary support therefor,

is a matter of such public interest and importance as to require anyone mentioned therein, however peripherally or slightly (as was petitioner), to prove actual malice in order to recover for libel?

3. Whether petitioner was denied due process of law as a result of being precluded by the court from introducing evidence of actual malice?

4. Where the court states that, in this case, the law limiting recovery in libel has been narrowed, for the first time, to the greatest permissible extent, is it a violation of due process to tax thousands of dollars in costs against and admittedly defamed attorney, in light of the discretion of the court in assessing costs? (Argument in petition for writ of certiorari incorporated herein.)

STATEMENT OF THE CASE.

Petitioner, Elmer Gertz, is, and has been for over 40 years, an attorney licensed to practice before the courts of the State of Illinois, both local and federal, as well as in several other states and this Court. (Tr. I 74) At all times he has enjoyed a high reputation, both as an attorney and as a citizen of the United States. (Tr. I 20, 68, 169, 173) During this period of time he has written reviews, articles and books. He has spoken in public and has been a member and officer of various legal and community organizations. (Tr. I 76) Largely because of his preoccupation with his law practice, he was much less active than usual in community organizations, public appearances and writing in the months immediately preceding the publication of re-

spondent's article and the pamphlet reprint thereof, the subjects of this proceeding. Prior to the publication of that article in April of 1969, he had never held or run for any public office, or held any position from which he had received any remuneration from the government. (Tr. I 94)

In June, 1968, a young man named Ronald Nelson was shot and killed by Richard Nuccio, a police officer of the City of Chicago. Plaintiff was retained as a private attorney for the family of the deceased youth to represent them in private civil suits brought against the police officer in the Circuit Court of Cook County and the United States District Court for the Northern District of Illinois. (Tr. I 70-71) At no time did petitioner ever make any public statements of any kind in regard to these cases, nor was he ever publicly quoted as to Nuccio or the cases. (Tr. I 71) While some newspaper articles appeared regarding the fact that Officer Nuccio had been criminally tried and convicted of murder, none of them referred to petitioner, with the exception of one or two very short articles which merely stated passingly that he had filed civil suits against Nuccio on behalf of Ronald Nelson's parents. (Tr. I 155)

In March, 1969, the April issue of "American Opinion", published by respondent, appeared on the newstands across the country. It contained as its lead article, "Frame up, Richard Nuccio and the War on Police." This article contained several false and defamatory statements of and concerning petitioner, among which are the following:

p. 5—

"The file on Elmer Gertz in Chicago Police Intelligence takes a big, Irish cop to lift. According to the Communist *Worker* of December 8, 1964, he has signed a petition to abolish the House Committee on Un-

American Activities. On May 12, 1966, he sponsored another such petition, published by the Illinois division of the American Civil Liberties Union—founded by Harry F. Ward, one of the top Communists in the United States. Gertz also was a pallbearer for Jack Ruby, the 'lone fanatic' who killed the 'lone fanatic' who killed the President of the United States. He has been an official of the Marxist League for Industrial Democracy, originally known as the Intercollegiate Socialist Society, which has advocated the violent seizure of our government."

pp. 5-6—

"The Communist parade in April included the usual Communist violence. Apparently, the traitors were practicing for what they planned to do in August. And just as the phony Walker Commission and its *Walker Report* followed the terrorism in August, so a Commission and a report called *Dissent and Disorder* followed the terrorism in April, financed by the Roger Baldwin Foundation of Communist Harry Ward's A.C.L.U. After an 'impatrial investigation,' the A.C.L.U.'s Commission ridiculed 'the inaccurate impression that the April 27 event was a left wing affair'; exonerated the Communist Chicago Peace Council, which ran it; and naturally blamed the violence the Communists caused on the Chicago police: 'On April 27, at the peace parade of the Chicago Peace Council, the police badly mishandled their task. Brutalizing demonstrators without provocation, they failed to live up to that difficult professionalism which we demand.'"

"And the Chief Counsel for the Commission which committed *Dissent and Disorder* was the same Elmer Gertz who now turns up as lawyer for the Nelsons in the attack on Officer Nuccio."

"In fact, the only thing Chicagoans need to know about Gertz is that he is one of the original officers, and has been Vice President of the Communist National Lawyers Guild—which has been described by the House Committee on Un-American Activities as 'one of the foremost legal bulwarks of the Communist Party'—and which probably did more than any other outfit to plan the Communist attack on the Chicago police during the 1968 Democrat Convention."

p. 9—

Below a photograph of Elmer Gertz there appears the following: "Elmer Gertz of Red Guild harasses Nuccio."

p. 10—

"Like millions of other Americans, he was watching an organized attempt to discredit our local police—organized primarily by the Communist National Lawyers Guild, preeminent in which is the same Elmer Gertz who now appears as the Nelsons' lawyer."

p. 12—

"The C.P.C., as you will recall, is the Communist outfit headed by a Communist and defended by Leninist Elmer Gertz, who now turns up as lawyer for the Nelsons."

p. 17—

"Two Chicago Assistant Corporation Counsels warned Nuccio not to testify at the coroner's inquest, for fear what he said might jeopardize their defense against Communist-fronter Gertz." (R. 17)

Not only did this article appear in "American Opinion", but it was also distributed in reprint form in the streets of Chicago, as well as elsewhere. (Tr. I 23) In fact, this

is how the article first came to petitioner's attention. (Tr. I 25, 76)

After looking into the matter to determine liability, petitioner brought suit almost immediately against respondent. Despite the commencement of suit and service of summons upon respondent and the information contained in the complaint, completely discrediting the defamatory article, distribution of the article, both in magazine and reprint form, continued unabated in substantial amounts, for months afterwards, almost to the very time of trial. (Tr. I 56)

Respondent moved to dismiss the complaint for failure to state a claim upon which relief can be granted, or alternatively, for failure to satisfy the requisite jurisdictional amount. (R. 39) This motion was denied by the District Court, which held that it was libelous *per se* to label one falsely a Communist. The court went on to hold that since the article dealt with petitioner's participation as counsel in certain private law suits, it therefore reflected primarily and directly upon his profession and practice of law. The Court held that the charges contained in the article imputed to petitioner a want of the requisite qualifications to practice law, as such an imputation must necessarily cast grave doubts upon his qualifications to uphold, apply and interpret our system of laws, which is opposed by Communist theory, and was therefore actionable *per se*. 306 F.Supp. 310.

In conducting the *voir dire* the trial court inquired of all prospective jurors whether they had heard anything about petitioner. (Tr. I 5) Not one indicated that he was familiar with him in any way, which the District Court found significant in concluding that he was not a public figure. (Tr. II 50)

At the trial, respondent made no effort to prove that any of the statements in the article concerning petitioner were true. It admitted that "prior to the publication of the controverted article, and at the time of the promulgation thereof, this defendant had no knowledge concerning the plaintiff other than the article itself. In publishing the article it relied solely upon the reputation of the free-lance writer, Mr. Stang for accuracy." Despite this, the managing editor of the magazine admitted at the trial that he personally had written in the magazine that the author of the article had conducted extensive research into the Nuccio case and had gotten the facts. He further wrote that the trial of Officer Nuccio was part of the Communist war on police, and that the article was so important that reprints would be made immediately available. He also wrote a caption under petitioner's picture in the article stating: "Elmer Gertz of Red Guild harasses Nuccio." (Tr. I 26-7, 34-5)

The managing editor admitted that his sole source of information for each of these statements was the article itself. He made no attempt to verify any of this information appearing in the article. No other attempt was made by anyone on behalf of respondent to verify this information. (Tr. I 34-7)

In fact, the idea for the article was generated by the managing editor, who approached the author, informed him of the Nuccio case and requested him to look into the situation, with a view to meeting the specific needs of American Opinion magazine. (Tr. I 38) Respondent considered this a very important article and rushed it into print more quickly than usual. In effect, the article was designed and tailored by respondent, vouched for by it, and edited so as to express its viewpoint.

American Opinion magazine espouses the doctrines and viewpoints of the John Birch Society. (Tr. I 45) The magazine is distributed through American Opinion Book Stores, children of the same corporate father, the John Birch Society. There are approximately 280 of these stores across the country. (Tr. I 51) About 42,000 copies of the magazine were circulated through the subscription list, and 86,000 reprints of the article were distributed across the country by respondent. (Tr. I 53, 55) These magazines and reprints were still being sent out in large numbers months after the filing of the instant cause and service of process. (Tr. I 56)

Petitioner testified that at no time had he been contacted by anyone regarding the research for this article or any of its allegations. (Tr. I 77) He denied all of the specific defamatory statements concerning him contained therein, including the following:

1. He had never been a member of the League For Industrial Democracy, the Intercollegiate Socialist Society, nor any organization, whether named in the article or otherwise, which purportedly advocated the violent seizure or overthrow of the government. (Tr. I 81)

2. He was never involved in a Peace Parade in 1968 in Chicago, nor at any time. (Tr. I 82)

3. He had no connection whatsoever with the Walker Commission or its Report. (Tr. I 82)

4. He had never heard of "The Red Guild." (Tr. I 83)

5. He has never been a member of the Chicago Peace Council. (Tr. I 83)

6. At no time has he ever espoused a Leninist or Communist doctrine, nor any similar doctrine, nor has

he at any time ever been a Leninist or Communist or Marxist nor anything similar. (Tr. I 84)

7. He had been legal counsel for the Sparling Commision, a group of leading citizens, which issued a report entitled "Dissent and Disorder", but none of the members of the Commission was in any way connected with any Communist organization. (Tr. I 84-5)

8. At no time did he have any connection with any criminal case against Nuccio. He appeared and asked questions at the inquest on the deceased, Ronald Nelson, in behalf of the family. That inquest reached no conclusion as to the cause of death of Ronald. There were also other attorneys present at that inquest, including an attorney for Nuccio. (Tr. I 86-7)

9. He never attended any of the sessions of any criminal case against Nuccio, nor did he make any public statements regarding either the criminal or civil cases. (Tr. I 88)

Gertz testified that he does not believe in violence of any kind. (Tr. I 154) No evidence to the contrary was offered. He testified as a lawyer with 40 years' experience that no attorney who is a Communist, Leninist or Marxist can properly represent clients who have property, financial or business interests, because Communism negates private property. Gertz testified that he believes in the institution of private property and has represented clients with property, financial and business interests. Most of his practice has related thereto. (Tr. I 159)

At the time the article was published, the Chicago Police Department had no intelligence file on him. (Tr. I 123, 211) It was utterly untrue, as claimed in the article, that there was a file on Gertz so big that it "takes a big, Irish cop to lift."

Respondent offered no witnesses to establish any alleged Communist conspiracy against the police and no evidence whatsoever of any kind, character or description to link Gertz with any such alleged conspiracy. It admitted that Gertz is not directly a part of any such conspiracy. In closing argument, its counsel admitted that the charges made by it against Gertz are untrue. (Tr. I 219)

Petitioner requested that respondent be required to produce Alan Stang, the author of the defamatory article, as an adverse witness. On respondent's several times repeated representation that Stang was simply a free-lance writer over whom it had no control, the court refused to require it to produce him and denied the requested instruction on the matter as to the inferences to be drawn. After the proceedings were over, petitioner learned for the first time that respondent had deliberately misrepresented the situation to the court; that in fact Stang was a contributing editor of American Opinion and contributing editor, as well, of another John Birch Society Magazine and one of the chief participants in its speakers bureau—an important part of the John Birch apparatus.

The cause was submitted to the jury under instructions which held that petitioner was not a public figure and which informed the jury that the article involved herein were libelous *per se*. The jury returned a verdict in favor of petitioner in the sum of $50,000.00.

After the rendering of this verdict, respondent filed a post-trial motion, upon consideration of which the District Court granted judgment notwithstanding the verdict in favor of respondent, holding that the article "painted the picture of a conspiratorial war being waged by the Communists against the police in general." The court found the subject matter to be one of public interest protected

by the First and Fourteenth Amendments, and in addition held that "by representing the victim's family in litigation brought against the policeman, Gertz thrust himself into the vortex of this important public controversy." The court then concluded that in order to recover petititoner was required to show actual malice, that is, that defendant knew the statements were false at the time it printed them, or that it had made them with reckless disregard as to their truth or falsity. The court concluded that petitioner had failed to prove such malice and therefore entered judgment in favor of defendant, despite the fact that he had concluded at trial that petitioner was not required to produce such proof and that, therefore, petitioner had not offered all of such available evidence of malice. (In fact, a good deal of evidence of malice appears in the record, but by no means all that might have been adduced, had opportunity to present it been afforded.)

Petitioner appealed to the United States Court of Appeals for the Seventh Circuit, which court affirmed the judgment of the trial court. The opinions of the Court of Appeals and the District Court are set forth in the petition for writ of certiorari.

SUMMARY OF ARGUMENT.

While this Court has been able to reach substantial agreement concerning the rules to be applied in libel cases involving public officials, it has been unable to reach such agreement regarding private persons who for one reason or another have become involved in events which are of public interest and importance.

This case presents a situation not previously considered by this Court. Petitioner here is not a public official nor

a public figure. He did nothing to thrust himself voluntarily into the limelight, nor is the subject matter of the article involved herein one involving action on the part of any governmental organization or entity insofar as petitioner is concerned. This factual situation results in a direct confrontation between the constitutional rights of freedom of speech and privacy.

A person's involvement in a matter of public interest and importance is based upon his conduct—conduct about which the public has the right to be informed. This being the basis upon which petitioner will be judged, it is fair and equitable that respondent also be judged by his conduct. Judging respondent by its subjective state of mind robs petitioner of any real opportunity to obtain redress for harm done to him, in violation of his constitutional right of privacy.

Since it is a constitutional right which petitioner seeks to protect—a right arising out of the Fourth and Fifth Amendments to the Constitution—the standard of conduct set forth in those amendments, probable cause, should be imposed on respondent. Petitioner, in order to make out a prima facie case, would have to prove falsity. Then, respondent would have to establish that he acted with probable cause. This standard would afford both parties the freedom and protection mandated by the Constitution.

Attorneys do not act merely on behalf of themselves. When involved in private litigation, they are the representative of their clients. An attack upon an attorney's reputation and integrity is also an attack upon their clients. Damage to an attorney's integrity is an impediment to his ability to represent his clients properly, and a direct injury to those clients as well.

Despite the holding of the trial court that petitioner was neither a public official nor a public figure, there is sufficient evidence in the record to support a finding of actual malice in the constitutional sense. The chief support for this proposition is the fact that even after it had been served with summons and a copy of the complaint in this matter putting it on notice of the falsity of its statements, respondent continued to distribute the defamatory article, both in magazine and reprint form, for almost a year, in large quantities. Yet, at the trial, absolutely no attempt was made to show that the statements of and concerning petitioner were correct, or that it had any evidence whatsoever to support them. Coupled with other similar elements, pointed out hereinafter, it is clear that respondent was guilty of actual malice.

Finally, the inconsistent rulings of the trial court deprived petitioner of a fair trial. Throughout the pre-trial proceedings and the trial itself, petitioner was informed that he would not be required to present evidence to satisfy the constitutional standard of malice. Only after the jury had rendered its verdict in his favor did the trial court change its position, and hold that plaintiff should have introduced evidence of actual malice in the constitutional sense. The failure to grant petitioner a new trial in order to give him an opportunity do so is clearly a deprivation of due process.

Where the court states that, in this case, the law limiting recovery in libel has been narrowed, for the first time, to the greatest permissible extent, it is a violation of due process to tax thousands of dollars in costs against an admittedly defamed attorney, in light of the discretion of the court in assessing costs. (Argued in petition for certiorari and incorporated herein.)

ARGUMENT.

I.

PETITIONER'S RIGHT OF PRIVACY HAS BEEN WRONGFULLY DESTROYED BY RESPONDENT.

In *New York Times* v. *Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964), this Court rendered an opinion which represented a distinct break with the traditional rules of law regarding defamation. Although that decision was not entirely without forewarning, it spawned a profusion of opinions, many of them inreconcileable. That multitude of opinions, many of which have come from the several Justices of this Court, demonstrates the strongly competing interests involved in this area of the law.

The *New York Times* case involved a libel suit brought by a public official—a Commissioner of the City Government of Montgomery, Alabama, whose duties encompassed the supervision of the Police Department, Fire Department of Cemetery and Department of Scales. He claimed that he had been libelled by an advertisement which appeared in the New York Times. This Court there held that in order for a public official to recover for libel as a result of a criticism directed toward his official conduct, he would henceforth be required to prove actual malice, i.e., that the allegedly defamatory matter was printed by defendant with knowledge that the statements were false, or with reckless disregard of whether they were false or not. Id. at 279, 283.

Several considerations were set forth in support of this result, among which were the following. The First Amend-

ment was "fashioned to assure unfettered interchange of ideas for the bring about of political and social changes desired by the people." Id. at 269. "Debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." Id. at 270. "The constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'" Id. at 271. It was held that erroneous statements must be "protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive.'" Id. at 271-72.

Balancing the right of the public to be informed regarding the activities of their officials against the interest of those officials in their good reputation, it was observed that criticism loses none of its protection because it effectively diminishes a public official's official reputation. Id. at 273. In rejecting the common law rule that a defendant be required to prove the truth of its assertions, the Court postulated that a fear on the part of the press that it might not be able to prove the truth of the statements in a court of law even though it believed the information to be true, and even if it was in fact true, would have the effect of dampening the vigor and limiting the variety of public debate. Id. at 279. Citing the common law rule of privilege long available to utterances by public officials within the scope of their duties, the Court held that a critic of public conduct is entitled to the same privilege. Id. at 282.

This view was not shared by all of the Justices of this Court, Justices Black, Douglas and Goldberg taking the position that the First Amendment grants "the press

an absolute immunity for criticism of the way public officials do their public duty." Id. at 295, 298.

In *Garrison* v. *Louisiana*, 379 U.S. 64, 85 S. Ct. 209 (1964), decided shortly thereafter, the actual malice requirements were extended to criminal libel cases. In rejecting the absolutist view taken by the minority in *New York Times*, Justice Brennan wrote that "calculated falsehood is no essential part of any exposition of ideas" and should not enjoy constitutional protection. Id. at 75.

Rosenblatt v. *Baer*, 383 U.S. 75, 86 S. Ct. 669 (1966), dealt with the next progression in this chain of events: "how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of [the constitutional] rule . . ." Id. at 85. Finding it unnecessary to draw precise lines at that juncture, it was found that the "strong interest in debate on public issues" and the "strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues", the Court held that the designation of "public official" would apply "at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." Ibid.

Even at this early stage in the development of this constitutional frontier, the Court recognized that there is "tension" between the interest in free and open debate and the "pervasive and strong interest in preventing and redressing attacks upon reputation." Id. at 86. At that point it was felt that the Constitutional rule was required "where a position in government has such ap-

parent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general interest in the qualifications and performance of all government employees." In light of the more recent exposition of this rule after the presentation of additional fact situations before the Court, it is safe to say that this standard has been expanded so that a general interest in the qualifications and performance of all government employees is sufficient ground to require the application of the Constitutional standard to all situations where government employees or personnel are concerned.

In *St. Amant* v. *Thompson*, 390 U.S. 727, 88 S. Ct. 1323 (1968), the Court refined the definition of "reckless disregard" by the holding that the plaintiff must present "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." Id. at 731. Disavowing any intent to emasculate the distinction between knowing falsity and reckless disregard, it was said:

> "Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." Id. at 732.

In *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 91 S. Ct. 621 (1971), the "public official" definition was extended

to include candidates for public office as well as incumbents. Id. at 271. There any dichotomy between statements relating to official as opposed to private conduct was rejected on the ground that "anything which might touch on an official's fitness for office is relevant." Id. at 273. A rule which would allow the jury to determine whether the charge levelled against the candidate was "relevant" to the elective office being sought was rejected on the ground that "as a matter of constitutional law . . . a charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's or a candidate's fitness for office for purposes of application of the 'knowing falsehood or reckless disregard' rule of *New York Times Co.* v. *Sullivan.*" Id. at 277. See also *Ocala Star-Banner Co.* v. *Damron*, 401 U.S. 295, 91 S. Ct. 628 (1971).

In *Pape* v. *Time, Inc.*, 401 U.S. 279, 91 S. Ct. 633 (1971), decided the same day, the Court applied the same rule to an article based upon an official government report.

With the exception of the heretofore noted absolutist position taken by Justices Black, Douglas and Goldberg, the other members of the Court have seemingly had little difficulty in applying the rule announced in *New York Times* to situations involving government officials and governmental sources.

There has been, however, a decided disagreement when the fact situation leaves this well-defined track, and involves individuals not directly connected with the government. This rift was foreshadowed by the concurring opinion filed by Justice Stewart in *Rosenblatt* v. *Baer*, supra, where he said:

"The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system."

• • •

". . . The First and Fourteenth Amendments have not stripped private citizens of all means of redress for injuries inflicted upon them by careless liars. The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored.

"Moreover, the preventive effect of liability for defamation serves an important public purpose. For the rights and values of private personality far transcend mere personal interests. Surely if the 1950's taught us anything, they taught us that the poisonous atmosphere of the easy lie can infect and degrade a whole society." 383 U.S. at 92-94.

In *Curtis Publishing Co.* v. *Butts* and *Associated Press* v. *Walker,* 388 U.S. 130, 87 S. Ct. 1975 (1967), the Justices were unable to resolve the conflicting policies between the public's right to know, and the individual's right to protect his reputation in a clear-cut manner. In the opinion announcing the decision of the Court, Justice Harlan counselled against a blind extension of the

New York Times rule, at the same time recognizing that the protection afforded by the First Amendment "must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." It was the view expressed in this opinion that while freedom of speech is as much a personal right to make thoughts public as it is a social necessity required for the "maintenance of our political system and an open society," an individual publisher has no special privilege to invade the rights and liberties of others. Id. at 149, 150.

Justice Harlan concluded, in light of his thorough analysis, that "it is the conduct element, therefore, on which we must principally focus if we are successfully to resolve the antithesis between civil libel actions and the freedom of speech and press." Id. at 153. This approach led the Justice "to seek guidance from the rules of liability which prevail in our society with respect to compensation of persons injured by the improper performance of a legitimate activity by another." Such an analysis led to the drawing of a balance between "a departure from the kind of care society may expect from a reasonable man performing such activity" and an investigation of "the plaintiff's position to determine whether he has a legitimate call upon the court for protection in light of his prior activities and means of self-defense." Id. at 154.

Under traditional tort rules both Butts and Walker would have been classified as "public figures", having both commanded a substantial amount of independent public interest, Butts by virtue of his position as a famous football coach, and Walker, by his purposeful activity thrust-

ing his personality into the "vortex" of an important public controversy. Central to this finding was the conclusion that "both commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able to expose through discussion the falsehood and fallacies" of the allegedly defamatory statements. Ibid. Justice Harlan's analysis led him to a standard allowing a "public figure" to recover for a libelous statement "on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." Id. at 155.

Chief Justice Warren, along with Justices Brennan and White, would adhere to the standard of *New York Times,* the latter disagreeing that punitive damages could be based upon personal ill will or hatred on the part of defendant. Id. at 173-74. Justices Black and Douglas adhered to their strict view that the First Amendment prohibits all libel actions against "the press." Id. at 172.

Thus, no clear-cut majority rule emerged for any standard. This disagreement became even more pronounced in *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29, 91 S. Ct. 1811 (1971). All members of the Court agreed that defendant's radio broadcast of a news story about plaintiff's arrest for the sale of allegedly obscene magazines was a legitimate matter of public interest and importance.

In an opinion written by Justice Brennan, joined by the Chief Justice and Justice Blackmun, it was held that the *New York Times rule* would be extended "to all discussion and communication involving matters of

public or general concern, without regard to whether the persons involved are famous or anonymous." Id. at 44. This conclusion was based upon the rationale that "we are all 'public' men to some degree." Id. at 48. The reasonable man standard was rejected as inconsistent with the interests sought to be protected by the First Amendment. Id. at 50.

Justices Marshall and Stewart suggested a completely different approach to the problem, opting for a rule that would leave the states "essentially free to continue the evolution of the common law of defamation and to articulate whatever fault standard best suits the State's need' with the caveat that strict liability cannot be used. They would, however, restrict damages to actual loss, allowing "more than direct pecuniary loss" but requiring that the damages "be related to some proved harm." Id. at 86.

Justice Harlan, in line with his analysis in *Butts* and *Walker*, would hold the defendant to a standard of reasonable care where the plaintiff is a purely private individual. Id. at 72. He would allow damages which would compensate for "those consequences of the publication which are reasonably foreseeable." Id. at 68. Punitive damages would likewise be limited to those which bear "a reasonable and purposeful relationship to the actual harm done." Id. at 75. Justice White, protesting that the other opinions filed in that case decided questions not before the Court, would focus on the nature of the actions being reported on, and limit the holding to the view that "the First Amendment gives the press and the broadcast media a privilege to report and comment upon the official actions of public servants in full detail,

with no requirement that the reputation or the privacy of an individual involved in or affected by the official action be spared from public view." Id. at 62.

But what of the non-public figure who is not involved in a report of official action? The instant cause presents all of the issues which were specifically left unresolved in the foregoing cases. Plaintiff is an attorney of long standing and good reputation in Chicago. While it cannot be said that he was unknown, he was hardly a personage who commanded a substantial amount of independent public interest at the time of the publication involved herein. In fact, the editor of defendant's magazine had never heard of him. Similarly, none of the members of the jury panel in this cause could ever recall having heard his name. Nor had he voluntarily thrust himself into a public controversy over the persons or incidents involved herein. He represented private clients in private litigation. He made no public speeches, statements or appearances of any kind in regard to the matter discussed in the defamatory article. He did absolutely nothing to call attention to himself or to his clients in regard to this subject-matter. Nor did the article allege that he had. The only statement in the article regarding his actions in this matter were that he had "filed three suits against Officer Nuccio and the City of Chicago" and that he "was active at the inquest" into the death of the slain youth. The rest of the statements concerning him were in reference to alleged former activities and his membership in various organizations which were falsely characterized as being Communistic or Communist-dominated.

It is in such a situation where the right to be let alone collides head-on with the right of the public to be informed. This collision was discussed by the Court in *Time, Inc.* v. *Hill,* 385 U.S. 374, 87 S. Ct. 534 (1967). In that non-defamatory context a majority of the Court held that so long as the press spoke of a person in regard to his involvement in a matter of public interest and importance, that person could not recover an award for the invasion of his privacy unless the *New York Times* standard was met. Id. at 387-88. Again, the question was reserved as to the result in a libelous situation where the plaintiff was involuntarily thrust into the public limelight. Id. at 391.

Again, there were vigorous dissents. Justice Harlan declared that the "First Amendment, and as reflected in the Fourteenth, cannot be thought to insulate all press conduct from review and responsibility for harm inflicted." In his view, the press "can also be reached when it creates a severe risk of irremediable harm to individuals involuntarily exposed to it and powerless to protect themselves against it." Id. at 410.

Justice Fortas, joined by Chief Justice Warran and Justice Clark, pointed to the constitutionally protected right of privacy, which had been described by Justice Brandeis over forty years ago as "the most comprehensive of rights and the right most valued by civilized men." *Olmstead* v. *United States,* 277 U.S. 438, 478, 48 S. Ct. 564, 572, 72 L. Ed. 944 (1928). They would hold that "the standard of a 'reasonable investigation' is certainly a minimum yardstick by which to measure the liability of publishers." Id. at 417.

The facts of this case present a clear-cut example of the kind of mischief which can be wrought by ignoring the right of privacy which this Court has so ringingly affirmed in other contexts. The Court of Appeals below observed that "the addition of an unnecessary and irrelevant comment about a private individual is not automatically protected simply because it is contained in an article dealing generally with an important subject." Then, without fully considering the matter, it held that "even a false statement of fact made in support of a false thesis is protected unless made with knowledge of its falsity or with reckless disregard of its truth or falsity." Where is the consideration for plaintiff's right of privacy? While the article dealt with some official activity—the murder prosecution of a Chicago Police Officer—plaintiff was not a part of that prosecution in any way. Yet, defendant alleged in its article that not only was plaintiff a person who did not believe in our form of government, but was one who had actively taken part in a brazen conspiracy to convict an innocent man of murder. Each and every one of these statements were false. Plaintiff testified to their falsity, and defendant made absolutely no attempt to show that even one of them was true. Yet, because plaintiff, not being given an opportunity to do so, did not prove that the publisher knew they were false, or acted with reckless disregard of their truth or falsity (a high degree of awareness of their probable falsity), he has been denied compensation for such obviously damaging statements. (In fact, there is evidence from which it can be concluded that defendant was so reckless as to be malicious, i.e., its continued distribution of the defamatory article long after the filing of suit.) Such a result cannot be counte-

nanced by a system which seeks to grant justice to all men. Some reasonable accommodation must be made between the right of the private individual to be let alone and the right of the public to be informed on all manner of public affairs.

That the public is entitled to a vigorous, free and untramelled press cannot be disputed. That along with freedom must go responsibility is a necessary corollary. There must be some limitation upon freedom, as upon power. Absolute freedom, like absolute power, results in anarchy and corruption. The right of the individual must be protected if we are not to regress to the level of savages.

In *Rosenbloom* this Court left open for further exposition the delineation of the reach of the term "issue of public or general concern." Supra, at 44. Candor compels the conclusion that given the broad range of matters vital to a society as complicated as ours any subject deemed to be worthy of comment save the most egregiously inappropriate personal attacks upon an obscure individual are proper for discussion by the press. What limit, then, is available to avoid unrestricted license which must ultimately lead to intolerable abuse?

Requiring this plaintiff, as well as others similarly situated, to prove knowing falsity, or a high degree of awareness of falsity, is certainly not the answer. The persons who would have knowledge of such facts are those who would have most cause to deny their existence. Particular difficulty is encountered in a situation such as the instant case where the article was written not by an agent or employee of the publisher, allegedly, but by a free lance writer, an independent contractor. (In

fact, he was an instrumentality of the publisher.) Yet, defendant, accepts the benefit of his views, written to its order, and reaps the reward in the form of sales of its magazine. How can a plaintiff hope to prove that the publisher had actual knowledge of the falsity of its material even where the publisher, as here, commissions the article? How can plaintiff prove that defendant had any degree of awareness of the possible falsity of the article when the publisher states, as was the case here and will be the case in virtually every situation, that it merely took the story as it was given to it and published it verbatim. Such a holding destroys any ability of a private individual to obtain even the slightest recompense for his damage. A public official or public figure has the ability to reply in kind. He has access to a forum in which to defend himself, for what a public official says is generally considered news. But what of the obscure, unknown individual caught up in the maelstrom of some issue in which the public may be interested, not of his own making? Where the matter is not one of "hot news" the likelihood that he will be interviewed, or even listened to, by a reporter is slim, to say the least. His ability to write a letter to the editor's column is illusory, particularly where the editor who decides whether or not to print his rebuttal is most likely to be the one who authorized publication of the defamatory material against him in the first place.

It is obvious that such a person's only recourse is to the courts. By dint of one-sided rules militating against him, close their doors to him, he must bear his loss in solitude. Many states, including Illinois, have State constitutional provisions which guarantee that for every

wrong there shall be a remedy. Illinois Constitution of 1970, Article I § 12. That is not an idle platitude, but a soaring goal earnestly to be sought, and hopefully obtained. Certainly, perfection is the most illusory goal imaginable. Yet, we must strive to approximate that goal as nearly as our frail abilities allow.

We deal here with a collision of great ideals. The worth of the individual, no matter how small or obscure, is the pervasive ideal of our system. Every individual must be afforded at least an opportunity to seek redress for his injuries. An attitude which postulates that the "public good" is more important than the worth of such an individual will surely lead to a repressive society. Here, the repression is not at the hands of the government, but at the hands of those wealthy and fortunate enough to gain access to the channels of communication of this country. Our anti-trust laws seek to inhibit economic repression. Personal repression must not be countenanced in the guise of freedom of the public to be erroneously informed. No segment of society is entitled to a special right. Yet, all would agree that the press must be allowed to flourish. A balance must be struck which is even-handed and fair to both interests which are of the utmost importance to the continuation of our society.

How does an individual become involved in a matter which becomes of interest and importance to the public? In almost every conceivable instance, it is because of some conduct on his part. In the case of public officials, they have sought public office. In many instances, they have taken some action in the execution of the duties of that office of which the public ought to be informed. In the case of public figures, such as General Walker, they

have taken some overt action which catches the eye of the public. In the case of individuals such as Mr. Butts, they are involved in some activity which depends upon public participation or at least public spectatorship for its existence. In a situation such as *Rosenbloom* they have engaged in some activity thought to violate the law. They are involved in matters of public interest and importance as a result of some conduct on their part—some action or activity which has called them to the public's attention.

Plaintiff here attended and participated in an inquest to the extent of asking some questions and brought suit on behalf of clients. He did not seek nor did he engage in any controversy or publicity. In such a situation, where the defamatory comment about the private plaintiff, a lawyer in private practice, is not germaine to what he has done in regard to the subject matter being discussed, should he be judged by his state of mind or by his conduct? As set forth in *Rosenbloom,* the protection accorded the press revolves about the public's right to receive information about plaintiff's conduct—things which he has done. Insofar as the subject matter of this article is concerned, the public may have a legitimate right to know what, if anything, plaintiff did in regard to participating in the prosecution of officer Nuccio. He had absolutely nothing to do with it, as testified to by Nuccio's own attorney. In its article, defendant had asked the public to judge plaintiff based on his alleged activities—both past and present—having nothing to do with the Nuccio case. Defendant asks the public to judge plaintiff on his conduct—his membership in various organizations, his actions in furtherance of his membership in

those organizations; these things having nothing to do with the Nuccio case.

Yet, defendant has argued, and the Court of Appeals below has held, that defendant is not to be judged by the same standards. Defendant is not to be judged on its conduct, but its invisible or professed state of mind. Yet, defendant is able wholly to control what is to be regarded as its state of mind. It can deliberately close its eyes to the facts by not inquiring into them; even when it has commissioned an article, as here. Plaintiff's ability to succeed, under this view, is dependent upon the wholly fortuitous circumstances that perhaps someone, unbidden, will call defendant's attention to the true facts and put it on notice of the falsity of its publication. In other words, defendant is able to manufacture its own immunity, in good faith or in bad faith. It picks the subject, assigns an author to seek the "facts" which it desires, and which will support its preconceived attitudes, and no more. It then piously declares that it has no knowledge that the statements were false, and merely relied upon the independent author. In truth—despite any legal fiction—defendant published the article because it supported a preconceived viewpoint.

Such a situation deprives plaintiff of his own worth. That worth may be destroyed in a single stroke, and yet he has no recourse. Being unable to reply in kind, he must accept his lot and not complain. Such a standard destroys the privacy of the individual, and deprives him of his constitutional right to be let alone. It robs him of his reputation without redress.

Why should not defendant be judged by its conduct in the context of the fact situation? The factors to be considered have been discussed by the Justices of this Court in various contexts. As set forth by Justice Harlan in *Butts,* they include: the harm inflicted upon the plaintiff; the seriousness of the charges; whether the matter printed was "hot news"; the reliability of the source; the presence or absence of substantial independent support for the source's information; the attempts, if any, to verify the story; the bias, if any, of the investigators; the policy and attitude of the publication itself; and the internal consistency of the story itself. These are all factors that both judges and juries are called upon to consider daily. The test of time has proven that these are the kinds of guidelines with which the courts work best. They are the kinds of factors with which we each deal in our daily activities. They are familiar and reliable.

The objection, however, is that unless assured of a reasonable standard by which it is to be judged, the press will be forced into self-censorship, and the public will be deprived of the information which it requires in order for our society to function. Various tests have been proposed in the various opinions of this Court in recent libel cases. None have achieved sufficient acceptance.

As Justice Harlan also observed in *Butts,* one of the relevant factors to be investigated is "the plaintiff's position to determine whether he has a legitimate call upon the court for protection in light of his prior activities and means of self-defense." *Curtis Publishing Co.* v. *Butts, supra,* at 154. It is postulated in cases such as this that plaintiff has engaged in no prior activities which would

subject him to public scrutiny and that he has no adequate means of self-defense. The only remaining test to determine whether he has a legitimate call upon the court for protection is whether he has been defamed. Certainly he has no claim upon the protection of the Court unless the defamatory material is untrue. If true, plaintiff has suffered no more than he deserves. It therefore seems legitimate that the plaintiff be required to prove, in the first instance, that the defamatory material is false. This would ensure that the press need not fear printing the truth, and exercise self-censorship upon pain of having to prove the truth in Court. Since plaintiff is complaining of injury to his reputation, it is certainly not too much to ask that he be required to prove that the defamation is unjust.

But by what standard is defendant's conduct to be measured? It is respectfully submitted that the answer to the collision of the two great constitutional interests is found in the constitution itself. The right of privacy has been said to emanate from the penumbra of the Fourth and Fifth Amendments to the Constitution. *Griswold* v. *Connecticut,* 381 U.S. 479, 484-85, 85 S. Ct. 1678 (1965). That being the case, the source of that right ought similarly to define its protection. A deprivation of a person's privacy, by way of destroying his reputation, is certainly a taking as surely as any search or seizure. The Fourth Amendment prohibits any search except "upon probable cause." Why should this standard not be applied to a taking such as this as it is applied to the taking of a person's physical liberty? The courts are eminently used to making determinations of probable cause. The factors to be taken into consideration in such a determination

are strikingly similar to the factors discussed by Justice Harlan in *Butts*. See also *St. Amant* v. *Thompson* where the court considers the reliability of the informant. As made clear in *Monroe* v. *Pape*, 365 U.S. 167, 81 S. Ct. 473 (1961), and its progeny, a taking without probable cause is compensable in damages. Under proper instructions, the jury is considered perfectly capable of making such a determination. As explained in *Pierson* v. *Ray*, 386 U.S. 547, 87 S. Ct. 1213 (1967), good faith and probable cause are appropriate defenses in a case where the plaintiff seeks damages for deprivation of his Fourth Amendment rights by governmental officials. The State is held to this standard before it may invade a person's privacy by way of a physical search and seizure. Is it not appropriate to require that the press be held to this same standard when it has been alleged that it has similarly invaded a man's privacy by wrongfully defaming him.

This suggestion does not smack of censorship in any manner. There is absolutely no suggestion of censorship here. The press is perfectly free to publish what it will. The plaintiff has the burden of proving falsity, thus relieving the press of the requirement of guaranteeing the truthfulness of its statements. It need only show that it had some probable cause to believe the truth of the statements. Such a standard will give the press the breathing room it requires but will ensure that persons like plaintiff will have a legitimate opportunity to obtain recompense for harm done to them where the press has abused its liberties. The burden thus placed upon the press is minimal. Can it be said that the values guarded by the press are any more important than the values guarded by our police? When the police trample upon civil rights and

liberties, they are subject to sanctions. Similarly, the press, in this area, should be called upon to account for harm done by infringing the constitutionally protected right of privacy, in a manner which offends the very standards of the constitution itself. Those who thrust themselves purposefully into the limelight have waived their right of privacy. While we are all public men to a limited extent, we do not throw ourselves open to unprovoked and unjustified attacks which have no basis in fact, when we have done nothing to call the public's attention to us. When a person has not engaged in activity which would call the public attention to him, he is entitled to maintain that anonymity which has been destroyed by the purposeful action of the defendant. It is perfectly justifiable to call upon defendant to show that he had probable cause to make the false statements about plaintiff and bring him unbidden to the public eye.

That defendant here had no such probable cause is abundantly clear. No attempt at all was made at the trial to defend the false statements regarding plaintiff. The only defense was that the editor of defendant's publication relied upon the author. Yet, there is evidence that the author did not even discuss the subject matter of the article with officer Nuccio's attorney, nor with plaintiff. No hint is given of where he obtained his information about plaintiff. Yet, without any basis whatsoever, defendant's editor specifically stated that the author had "conducted extensive research into the Richard Nuccio case," had "gotten the facts" and "that this is a part of the Communist war on our police is as certain as the innocence of the officer they have chosen as their symbolic target." (Parenthetically, it should be pointed out that

after Nuccio had been convicted in a bench trial, his conviction was reversed and remanded by the Illinois Supreme Court. *People* v. *Nuccio*, 43 Ill. 2d 374 (1969). Upon retrial, he was again convicted, this time by a jury, which conviction has been upheld by the Illinois Supreme Court just recently. ..... Ill. 2d ....., Docket No. 43820, March 27, 1973). The editor, Stanley, admitted that he had absolutely no basis for making these assertions, other than from the text of the article itself, and "an implied relationship between an author and an editor." Bear in mind that Stanley completely misrepresented the author's connection with the magazine and the John Birch Society. He has a direct, official connection with both.

The record is clear that defendant had a pre-conceived plan to attack plaintiff, as well as the others mentioned in the article, and that that plan was to label all such persons Communists, regardless of the facts. Defendant cannot be allowed to sidestep responsibility for these calculated statements by saying that it relied upon Stang. The evidence shows that it sent Stang out to write this very article, telling him beforehand what he was to say. Such an abuse of the freedom of the press cannot be countenanced, but must be condemned as a clear violation of plaintiff's constitutional right of privacy.

II.

ATTORNEYS ARE ENTITLED TO A PARTICULAR PROTECTION WHEN REPRESENTING CLIENTS.

Were the statements made of petitioner's activities on his own behalf, the destruction of his reputation would be serious enough. Here, however, petitioner's involve-

ment came about not because of what he had done on his own motion, but because of actions which he took in good faith on behalf of clients who had retained him to represent them. He was not acting out of any personal motivation, but in carrying out his duty as a representative of others who had come to him in this particular function and capacity. Thus, respondent's actions had a three-fold effect: 1) they tended to destroy petitioner's own personal reputation, both as a person and as an attorney; 2) they tended to destroy his ability properly to represent these particular clients; and 3) they tended to destroy his ability properly to represent other clients who had absolutely no involvement with this subject matter.

Attorneys are held to a high degree of responsibility in representing their clients. They are personal representatives, acting in a fiduciary capacity. Not only are they entitled to the same protection of their private reputations as are others, but also their clients are entitled to have their attorney's reputation protected. Statements such as were made about petitioner by respondent here could well make other clients of petitioner fear that as a result of these statements, petitioner would be unable properly to represent their interests. Indeed, should respondent's attacks become widely known and believed, they could in fact hamper petitioner's ability properly to represent those other clients, particularly those having property interests. Petitioner's arguments and positions on behalf of clients would not be judged upon their merits, but always against the background that perhaps he was not merely acting on behalf of his clients, but also with a view toward furthering his own personal "Communistic" views and attitudes.

In seeking to become an attorney, an individual voluntarily takes upon himself the duties imposed by the canons of ethics. This is a burden willingly assumed for a variety of individual reasons. By assuming this burden, to act fairly and honestly in behalf of others, to represent them in the furtherance of our public policies in favor of amicable, non-violent resolution of disputes, does he thereby place himself, as well as his clients, in such a position as to become fair game for every crackpot or extremist with an ax to grind?

Is every attorney, representing a client, to be exposed to the most scurrilous attacks, with absolutely no recourse? May a defamer concoct wholly fictitious stories about an attorney which have no legitimate connection with the matter at hand? Are the members of the legal profession such public figures that they imperil their own livelihood, as well as the livelihood of their clients, to all unfounded attacks with absolutely no recourse? These issues must be considered carefully and fully, not in an offhand manner.

The resolution of those issues must be in favor of the attorney who fairly seeks to represent others, lest we make it so unpalatable for individuals to seek this position of trust that the public will be unable to obtain qualified representation.

III.

RESPONDENT WAS GUILTY OF ACTUAL MALICE.

Regardless of the rule of law to be applied in this case, the evidence is clear that respondent was guilty of actual malice both in punishing the article originally and in its

continued dissemination of the article after the institution of this suit.

The strictest test of malice, of course, is that set forth in *New York Times* v. *Sullivan, supra,* as expanded in *St. Amant* v. *Thompson,* 390 U.S. 727, 885 Ct. 1323 (1968), where it was defined as actual knowledge of the falsity of the statements made, or reckless disregard of whether the statements are true or false, i.e., with a high degree of awareness of the probable falsity of the statements. Here, the entire defense presented by respondent was that it relied upon Alan Stang, whom it described as a free lance writer, who had proven to be an accurate and complete researcher. No attempt was made to prove the truth of any of the assertions in the article regarding plaintiff. No witnesses were offered to establish the alleged Communist conspiracy against the police and no evidence of any kind, character or description was introduced to link petitioner with either such conspiracy, or with any Communist organization.

As proven by petitioner at trial, without any attempt at contradiction by respondent, we have here a situation in which there are not simply exaggerations, discrepancies, or slight errors, but monumental misstatements; lies made out of whole cloth. There was not even the slightest basis for calling petitioner a Communist, Communist-fronter, Leninist, Marxist or anything of that nature. These statements were not mere hyperbole or coloration, but completely false fabrications of the most damaging kind to an attorney dealing with propertied clients. Even if public issues were involved, respondent had no right to publish defamatory falsehoods about plaintiff who was an innocent bystander, representing purely private interests.

The conclusions reached by this Court regarding *Butts* are clearly applicable to this cause. Each of the following elements found in that case are present in this case: the story was in no sense "hot news"; elementary precautions were ignored; there was no support, independent or otherwise, for the statements made in the article; the author's notes were not viewed by any of the defendant's personnel without substantial independent support; no attempt was made to check with any of the others involved in the situation to check the accuracy of the statements made. As was stated in *Butts,* "the evidence is ample to support a finding of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."

There is no question that respondent is not what can be termed a "responsible publisher." It has a specific aim and viewpoint—to further the views of the John Birch Society, its parent organization. (Tr. I 186) In fact, this article was not merely submitted by Stang, but he was solicited by Stanley, the managing editor of defendant, to work on this story. By Stanley's own admission, Stang had written for defendant before, and there is no question that Stang knew what Stanley was looking for. Stang wrote an article which appeared in the October 2, 1968, issue of "Review of the News", another John Birch Society publication, of which Stang is contributing editor. In this article, Stang called both Richard M. Nixon and Hubert H. Humphrey Marxists and lumped them with Eisenhower, Paul Hoffman, Nelson Rockefeller and other great Americans as conniving with the Communists. This is the kind of work upon which Stanley

based his conclusion that Stang's facts are always accurate!

Respondent cannot be viewed in a vacuum. Its shrill and pronounced views which have been disseminated throughout the years makes it clear that it has an ax to grind, and that it will do so at every opportunity, regardless of the facts. Respondent is, indeed, well aware of its own propensities for maliciously defaming its betters. So characteristic is it of respondent and its affiliates that, undoubtedly fearful of the conclusions that might be drawn, its counsel presented a pre-trial motion in limine which speaks volumes as to its practices and the meaning thereof:

> "Now comes the defendant and moves the Court to limit the evidence and the questions and comments of counsel in the following respects:
>
> "1. In matters relating to other actions in defamation wherein the party defendant may have been a litigant, and not related to this case;
>
> "2. To matters relating to ostensibly slanderous or related comments by officers of the defendant corporation or individual members of the John Birch Society and concerning parties other than the plaintiff in this case, and particularly to the comments of Robert Welch relating to his criticism of President Eisenhower.
>
> "The above subject matter would be irrelevant to any of the issues in this cause and highly prejudicial to the defendant."

If respondent and its affiliates habitually malign great and patriotic Americans such as Generals Eisenhower and Marshall, is this not evidence of a malicious and depraved state of mind? Consider, as set forth above, the

writings of Stang, the author of the article involved herein. Such assertions can be characterized in various ways, not the least obvious of which is its malice. Petitioner is not an Eisenhower or Marshall, but respondent has treated him with the same calculated malice with which these great Americans have been treated. The trial court's conclusion that there was no proof of malice was a result of its having closed its eyes to the most obvious demonstration of it. Is there no public policy against permitting such character assassination in the guise of protected utterance?

Respondent cannot disavow Stang's defamation of petitioner because it vouched for the truth thereof in the very issue in which the article appeared. In the words of its managing editor, Stanley, Stang had "conducted extensive research into the Richard Nuccio case," had "gotten the facts", and "that this is a part of the Communist war on our police is as certain as the innocence of the officer they have chosen as their symbolic target." At trial, Stanley admitted that he had absolutely no basis for making these assertions, other than from the text of the article itself, and "an implied relationship between an author and an editor." (Tr. I 34)

The trial court's rulings prior to and during the trial made it unnecessary for petitioner to offer evidence as to respondent's actual malice or gross recklessness and, indeed, precluded him from so doing. Nevertheless, there is, in fact, and providentially, so much undisputed evidence in the record as to require a finding, as a matter of law, that there was actual malice or gross recklessness on respondent's part.

The chief evidence of gross recklessness is the fact that even after the complaint had been filed in the within matter, respondent continued distributing its defamatory article, both in magazine and reprint form, for almost a year, in large quantities. At that point in time it had received actual notice that the material was false. Yet, it continued to disseminate its scurrilous material to the public at large. This action fits well within the rules previously set out by this Court in *St. Amant* v. *Thompson*, *supra*, "a high degree of awareness of the probable falsity of its statements." Regardless of whether there was such high degree of awareness at the time of the original publication, from the service of summons upon it onward, there was in fact such knowledge. Yet, respondent continued its campaign unabated. This is actual malice as defined by this Court. As indicated above, respondent made absolutely no attempt whatsoever to demonstrate at trial that its statements concerning petitioner were true, or that it had any indication of any kind that they were true. In fact, its counsel admitted that they were untrue. What more evidence of bad faith could be imagined.

In addition, there was other proof which, coupled with this evidence of continued prolonged and widespread publication, was sufficient to support a finding of actual malice, including the following:

a) Respondent made no effort whatsoever to check the accuracy of any of the statements prior to publication, despite its knowledge that petitioner is a lawyer, necessarily dependent upon maintaining his professional and community reputation.

b) Respondent must have known that it is extremely serious to call a lawyer a Communist, or Communist-Fronter, or Marxist, or Leninist or anything similar and this should have put it on notice to check carefully.

c) Since American Opinion is a monthly publication without the deadlines common to the daily press, it had ample opportunity to check the statements in the article.

d) Respondent was in an excessive hurry to publish and distribute the article and reprint.

e) Respondent's managing editor himself vouched for the accuracy of the article although admittedly he had no actual knowledge upon which to base such representation.

f) Respondent's managing editor himself placed defamatory captions with respect to plaintiff in the article.

g) Reprints of the article were literally forced upon people on the Northside of Chicago, where petitioner resides.

h) Respondent persisted in repeating the false charge that plaintiff is a Communist-fronter in its answers to plaintiff's interrogatories, despite the true information imparted to it in the complaint.

i) Respondent's editor persisted in repeating the same defamatory statements about petitioner from the witness stand during the trial.

j) Respondent misrepresented to the court and plaintiff the status of the author of the article, thus leading the court to make an incorrect ruling and precluding plaintiff from cross examining Stang as adverse witness.

k) Stang did not contact Kachigian, Nuccio's attorney, nor did he contact Gertz. There is no evidence that he contacted others with knowledge of the facts. Respondent did not establish Stang's good-faith research. It carefully refrained from calling him to the stand for fear that his and its malice would be patent.

Thus, the testimony at the trial, coupled with the clear pattern of prior statements by respondent, show that the article herein was one of a long line, which were not made with any thought of truth or accuracy in mind, but solely to advance the theories of defendant's parent organization, The John Birch Society, from which respondent receives $1,000,000.00 for disseminating its views. (Plaintiff's Exhibit 4).

The appropriate rules to be applied here are set forth in *Goldwater* v. *Ginzburg*, 414 F. 2d 324 (2d cir. 1969), cert. den. 396 U.S. 1049, reh. den. 397 U.S. 978, where it is said at 337:

> "Reliance upon newspaper articles, books, and campaign literature, and upon accurate reprinting of another's letter are only factors which, with other factors, are probative of whether the publisher of the cumulated material was motivated by actual malice when he caused the full material to be published. Repetition of another's words does not release one of responsibility if the repeater knows that the words are false or inherently improbable, or there are obvious reasons to doubt the veracity of the person quoted or the accuracy of his reports. *St. Amant* v. *Thompson, supra* at 732, 88 S. Ct. 1323. Furthermore, in our case, Ginzburg added certain innuendoes to some quoted statements and quoted other statements out of context in order to support his predetermined

result. One cannot fairly argue his good faith or avoid liability by claiming that he is relying on the reports of another if the latter's statements or observations are altered or taken out of context."

Here, there was much reason to doubt the veracity of Stang, despite the disclaimers of Stanley. Anyone who writes that Richard Nixon, Hubert Humphrey and Dwight Eisenhower are Communists, or are working for the Communists has little claim to credibility. Respondents are not allowed to state categorically that they relied upon Stang, for it was Stanley who set Stang upon the trail, asking for a story saying exactly what was ultimately printed. He in behalf of defendant vouched for Stang's accuracy, and caused reprints of this important article to be circulated throughout the United States, both at bookstores owned by the John Birch Society, and on street corners as well. And, after being placed on notice of the utter falsity of the charges, these distributions continued, and Stanley attempted to repeat the libelous statements in his answers to interrogatories filed on behalf of defendant, and at trial, with absolutely nothing to support them. As was said in *Goldwater,* 414 F. 2d at 339-40:

"There are many parallels between the evidence tending to prove actual malice in this case and the proof in *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967), which the Supreme Court held was sufficient to establish actual malice. The Goldwater did not contain 'hot news'; the appellants were very much aware of the possible resulting harm; the seriousness of the charges called for a thorough investigation but the evidence reveals only the careless utilization of slipshod and sketchy investigative techniques; . . . and, obviously there was evidence as to whether there was a possible pre-

conceived plan to attack Senator Goldwater regardless of the facts. This evidence, together with the other facts brought out at trial established that the appellants not only knowingly published defamatory statements but also established with convincing clarity that the appellants were motivated by actual malice when they published these defamatory statements."

So also here, there is no question but that respondent had a pre-conceived plan to attack petitioner, as well as the others mentioned in the article, and that the plan was to label all such persons Communists, regardless of the facts. Respondent cannot sidestep responsibility for these calculated statements by saying that it relied upon Stang. It did not rely upon him, but sent him out to write this very article, telling him beforehand what he was to say. This is actual malice at its worst.

IV.

PETITIONER WAS DENIED A FAIR TRIAL AND DUE PROCESS.

Throughout the entire proceedings in this cause, petitioner proceeded on the assumption and theory that he was not a public figure, and that the subject matter of the article did not concern a matter of public interest and importance. The rulings of the trial court sustained this postion throughout. In denying respondent's motion to strike, the District Court held that the article was libelous *per se*. The court thus struck those defenses contained in respondent's amended answer which attempted to raise the issue of public figure. The District Court then concluded that the publicity surrounding the Nuccio case was not relevant to the cause, and refused to allow respondent

to introduce such evidence. Finally, the court held during the conference on jury instructions, that respondent was not entitled to raise the defense of the First Amendment privilege in this cause.

At the conclusion of the trial, the District Court held, for the first time, that petitioner was required to prove actual malice in the constitutional sense, that he had not, and that therefore judgment must be rendered for respondent. Indeed, the trial court specifically precluded petitioner from introducing much evidence at the trial (other than the continued widespread and substantial publication and distribution of the article and reprint) which would have indicated actual malice on the part of respondent. Then he was informed that his failure to produce this evidence was fatal to his case! Assuming that petitioner is required to prove actual malice in the constitutional sense on the part of respondent, common fairness requires that he be awarded a new trial before a jury so that he has a full and fair opportunity to do so. At this point he has been deprived of such opportunity. The failure to afford petitioner this right has deprived him of due process of law as guaranteed by the Fifth and Fourteenth Amendments. Nothing could be clearer.

That petitioner could establish malice on respondent's part is evidenced by its continued and widespread publication and distribution of the admittedly defamatory article almost to the moment of trial and by the other facts and circumstances heretofore set forth and discussed in the previous point at Pages 44 to 47.

What is most surprising in the failure to grant petitioner a new trial is that he had introduced much evidence

of actual malice, in the constitutional sense, on the part of respondent, despite his not being required to produce such evidence. The presence of this evidence, which could be greatly elaborated upon and augmented at another trial, makes it clear that the failure to grant petitioner an opportunity for such a trial deprived him of due process of law.

As was proved by petitioner at trial, without any attempted contradiction by respondent, the article did not contain simple exaggerations, discrepancies, or slight errors, but monumental misstatements, monstrous lies made out of whole cloth. There was not even the slightest basis for calling petitioner a Communist, Communist-fronter, Leninist, Marxist, Red, or anything of that nature. These statements were not mere hyperbole or coloration, but completely false, fabrications of the most damaging kind to an attorney dealing with private clients. Even if public issues were involved, respondent had no right to drag in and publish defamatory falsehoods about petitioner who was an innocent bystander, representing purely private interests. The conclusions reached by this Court regarding the plaintiff in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 86 Supreme Ct. 1975 (1967), are clearly applicable to this case. Each of the following elements found in that case are present here: the story was in no sense "hot news"; elementary precautions were ignored; there was no support, independent or otherwise, for the statements made in the article; the author's notes were not viewed by any of respondent's personnel, but were published without substantial independent support; no attempt was made to check with any of the others involved in this situation as to the accuracy of the state-

ments made. As was stated in *Butts*, "the evidence is ample to support a finding of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."

Respondent cannot disavow Stang's defamation of petitioner, because it vouched for the truth thereof in the very issue in which the article appeared. In the words of its managing editor, Stanley, Stang had "conducted extensive research into the Richard Nuccio case," had "gotten the facts," and "that this is a part of the communist war on our police is as certain as the innocence of the officer they have chosen as their symbolic target." Stanley admitted at the trial that he had absolutely no basis for making these assertions, other than from the text of the article itself and the "implied relationship between an author and an editor." Indeed, there is much undisputed evidence in the record, heretofore summarized, to show either actual malice or gross recklessness.

Thus, the testimony at the trial, coupled with the clear pattern of prior statements by respondent show that the article herein was one of a long line, which were not made with any thought of truth or accuracy in mind, but solely to advance the theories of respondent's parent organization, the John Birch Society, from which respondent receives $1,000,000.00 annually for disseminating its views. (Plaintiffs' Exhibit 4).

The appropriate rules to be applied here are set forth in *Goldwater* v. *Ginzburg*, 414 F. 2d 324 (2d Cir. 1969), cert. den. 396 U.S. 1049, reh. den. 397 U.S. 978, previously quoted.

Here, there was much reason to doubt the veracity of Stang, despite the disclaimers of Stanley. It was Stanley who set Stang upon the trail, asking for a story saying exactly what was ultimately printed. He, in behalf of respondent, vouched for Stang's accuracy, and caused reprints of this important article to be circulated throughout the United States, both at bookstores owned by the John Birch Society, and on street corners as well. And, after being placed on notice of the utter falsity of the charges, these distributions continued, and Stanley attempted to repeat the libelous statements in his answers to interrogatories and at trial, with absolutely nothing to support them. The parallel is found in *Goldwater,* 414 F. 2d at 339-40, previously quoted, as well as in *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967), which the Supreme Court held was sufficient to establish actual malice.

So also here, there is no question but that respondent had a pre-conceived plan to attack petitioner, as well as the others mentioned in the article, and that the plan was to label all such persons Communists, regardless of the facts. It cannot sidestep responsibility for these calculated statements by saying that it relied upon Stang. It did not rely upon him, but sent him out to write this very article, telling him beforehand what he was to say. This is actual malice at its worst, and refusal to at least grant petitioner a new trial was a grave miscarriage of justice.

CONCLUSION.

The Constitution guarantees both the right of freedom of speech and the right of privacy. An accommodation of those rights is imperative in the area of defamation, particularly when the attorney-client relationship is involved. The constitution provides a workable standard to be applied where a private individual is gratuitously implicated in a matter of public interest and importance. The courts have dealt with probable cause over a sufficient period of time within which to make it clear that such a standard is clearly understandable to all persons, and workable. Such a minimal standard will allow the press the breathing space it needs while granting to private individuals, particularly attorneys, a reasonable opportunity to obtain redress for obviously compensable wrongs.

The record in this case shows a flagrant and malicious defamation of a private attorney who in no sense placed himself upon the firing line in the situation involved herein. The subject matter of the article at issue was wholly concocted by respondent, who sent a so-called "free-lance" reporter, really its agent, not to get the facts, but to get misstatements, twisted and distorted in a manner so as to fit respondent's pre-conceived attitude. Certainly the record herein discloses sufficient grounds upon which to reinstate the verdict of the jury.

At least, petitioner is entitled to a new trial. He tried his case under one set of facts and theory, and after that trial had resulted in a successful conclusion, the District

Court and the Court of Appeals changed the rules, and deprived him not only of a judgment which he had gained, but deprived him of an opportunity to meet the standards which were applied to this case *ex post facto*.

The judgment of the Court of Appeals, affirming the judgment of the District Court, must be reversed and the verdict in petitioner's favor reinstated. Alternatively, the judgments below must be reversed with directions to order a new trial.

Respectfully submitted,

WAYNE B. GIAMPIETRO
Attorney for Petitioner.